

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-11589-RGS

AQUAE INTERNATIONAL, INC.

v.

M/Y OSIANA II

v.

ROBERT A. CONNELL and PATTON MARINE, INC.

MEMORANDUM AND ORDER ON THIRD PARTY
DEFENDANTS ROBERT A. CONNELL AND PATTON MARINE, INC.'S
MOTION TO DISMISS OR TRANSFER

July 21, 2004

STEARNS, D.J.

Third party defendants Robert A. Connell (Connell) and Patton Marine, Inc. (Patton), who are residents of Florida, were retained to perform a survey of the defendant motor yacht Osiana II.¹ Based on the defendants' mostly favorable survey, Mr. and Mrs. Curt Feuer, who are residents of Massachusetts, purchased the yacht. A few months later, the Osiana II proved in need of substantial repairs. A dispute subsequently arose over the cost of the work done by plaintiff Aquae International, Inc. (Aquae). On August 25, 2003, Aquae filed this action *in rem* to recover the balance due. The Osiana II counterclaimed, objecting that much of the work that had been performed was unauthorized. The Osiana II then filed a Third Party Complaint against Connell and Patton. On August 30, 2003, Aquae voluntarily dismissed its claims against the Osiana II, leaving the Osiana II as the remaining

¹The vessel's name is spelled variously by the parties as "Osiana" and "Osianna."

plaintiff.

Connell and Patton ask this court to dismiss the Third Party Complaint, contending that the court lacks personal jurisdiction, that the Complaint was improperly served, and that “vessels cannot sue persons.” In the alternative, the third party defendants move to transfer the third party action to the United States District Court for the Southern District of Florida.

BACKGROUND

The facts, as seen in the light most favorable to the Osiana II, are as follows. On January 7 through January 10, 2003, Connell, a marine surveyor and his employer, Patton, both doing business out of Miami, Florida, sea-tested the Osiana II on a twelve hour run between the Caribbean islands of Antigua and Guadalupe. They later inspected the yacht after a haul out at the LeMaire Yard in Guadalupe. According to their report, the yacht “was in good shape and that there were no HVAC problems, nor were there any problems with the hull or the stabilizers on the hull.”² Third Party Complaint ¶ 6. Connell and Patton were paid \$10,000 and their expenses for conducting the survey. The survey was sent to the Feuers at their home in Wellesley, Massachusetts.

Based on the survey, the Feuers purchased the Osiana II. On April 15, 2003, the Osiana II was found to be in need of extensive repairs. The captain of the Osiana II contracted with Aquae to perform the work. The contract required a \$29,653.50 deposit. Aquae rebuilt the Osiana II’s HVAC system at a cost of more than \$120,000.00. Additionally, the Osiana II “began to leak and required repairs to its hull and stabilizers of

²The survey report came to twenty-one pages, with a nine-page addendum of “recommendations.”

approximately \$60,000.00.” Id. at ¶ 9. The refitting was done entirely in Florida.

The Feuers disputed the bill and refused to pay the outstanding balance of \$89,564.35, claiming that much of the work done was unauthorized. In response, Aquae filed an *in rem* admiralty action in the District of Massachusetts to effect its maritime lien. Aquae subsequently seized the *Osiana II* upon its arrival in Boston Harbor. Asserting that Connell and Patton were negligent in failing to discover the extent of the vessel’s defects, the *Osiana II* filed its Third Party Complaint.³ Connell and Patton then moved to dismiss the action, asserting lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), insufficiency of process pursuant to Fed. R. Civ. P. 12(b)(5), and a failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), or alternatively, to transfer the action to the Southern District of Florida pursuant to 28 U.S.C. § 1404(a).

DISCUSSION

As a rule, a court should determine whether Article III jurisdiction exists before reaching the merits of a plaintiff’s claim. Steel Co. v. Citizens for a Better Env’t., 523 U.S. 83, 88-89 (1998). “In its simplest formulation, *in personam* jurisdiction relates to the power of a court over a defendant. It is of two varieties, general and specific. General personal jurisdiction . . . is the power of a forum-based court . . . ‘which may be asserted in connection with suits not directly founded on [that defendant’s] forum-based conduct’ Donatelli v. National Hockey League, 893 F.2d 459, 462-463 (1st Cir. 1990).

[G]eneral jurisdiction exists when the litigation is not directly founded on the defendant’s forum-based contacts, but the defendant has nevertheless

³The Third Party Complaint is in four counts, alleging claims for indemnification, contribution, breach of contract, and negligence

engaged in continuous and systematic activity, unrelated to the suit, in the forum state. . . . Specific personal jurisdiction, by contrast, is narrower in scope and may only be relied upon “where the cause of action arises directly out of, or relates to, the defendant’s forum-based contacts.”. . . The proper exercise of specific in personam jurisdiction hinges on satisfaction of two requirements: first, that the forum in which the federal district court sits has a long-arm statute that purports to grant jurisdiction over the defendant; and second, that the exercise of jurisdiction pursuant to that statute comports with the strictures of the [Due Process Clause of the] Constitution.

Pritzker v. Yari, 42 F.3d 53, 59-60 (1st Cir. 1994). See also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-473 (1985) (due process constraints); International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (“fair play and substantial justice”); Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 209-210 (1st Cir. 1994) (the “Gestalt” factors); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (purposeful availment); Bond Leather Co., Inc. v. Q.T. Shoe Mfg. Co., Inc., 764 F.2d 928, 932-933 (1st Cir. 1985) (same).

If challenged, the burden is on the plaintiff to show a prima facie case authorizing personal jurisdiction. U.S.S. Yachts, Inc. v. Ocean Yachts, Inc., 894 F.2d 9, 11 (1st Cir. 1990). While in its opposition, the *Osiana II* alleges that the court has both general and specific jurisdiction over Connell and Patton, it offers no real factual support for its jurisdictional claims.⁴ Its brief in support of jurisdiction states only that the written survey was mailed to the Feuers in Massachusetts and that there were unspecified “numerous

⁴Apparently attempting to make a case for general jurisdiction, the brief asserts that “the web site for Patton Marine, Inc. (Pattonmarine.com), specifically states that they have worked in over thirty countries around the world and all along the eastern seaboard.” Id. at 4. This vague allegation fails to meet the stringent constitutional requirement of “continuous and systematic activity” in Massachusetts necessary to satisfy an assertion of general jurisdiction. See United States v. Swiss American Bank, Ltd., 274 F.3d 610, 619-620 (1st Cir. 2001); Noonan v. Winston Co., 135 F.3d 85, 92-93 (1st Cir. 1998).

telephone calls, emails, and faxes that [Connell and Patton] had previously sent to Massachusetts in support of their survey.”⁵ Opposition Memorandum, at 4. There are simply no facts plead with sufficient specificity to permit the court to determine that the third party defendants’ “minimum contacts” with Massachusetts were “purposeful”⁶ and of the type that would make it “reasonable” for them to expect to be “haled into court” here. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 581 n.4 (1999); Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 110 (1987).

The *Osiana II* asserts that venue is proper in the District of Massachusetts because this is “where the vessel was arrested.” But unlike *Aquae*, the *Osiana II*’s claims against Connell and Patton are not “maritime process *in rem*,” that is, claims against a vessel. Therefore, Connell and Patton may properly assert any of the Fed. R. Civ. P. 12 defenses, including lack of personal jurisdiction.

ORDER

⁵While the brief cites a trip taken by Connell to Newport, Rhode Island, to re-inspect the *Osiana II* in support of the contention that “minimum contacts exist” and that “notions of fair play and substantial justice are met,” Connell’s presence in Rhode Island cannot support an assertion of specific jurisdiction in Massachusetts.

⁶In order to satisfy constitutional requirements for personal jurisdiction, “[f]irst, the claim underlying the litigation must directly arise out of, or relate to, the defendant’s forum-state activities. Second, the defendant’s in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state’s laws and making the defendant’s involuntary presence before the state’s courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.” Barrett v. Lombardi, 239 F.3d 23, 26 (1st Cir. 2001), quoting United Elec. Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992).

For the foregoing reasons, the court will provisionally allow the motion to transfer the third party action to the Southern District of Florida. The Osiana II will have twenty-one days to produce facts sufficient to establish specific jurisdiction over Connell and Patton in a Massachusetts court, failing which the transfer order will take effect.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE